Bredero Shaw, A Division of Shawcor Ltd. *and* Local 653, International Union of Operating Engineers, AFL–CIO, Petitioner Case 15–RC–8356

August 27, 2005

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered an objection to and determinative challenges in an election held April 14, 2003, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 58 for and 47 against the Petitioner, with 16 challenged ballots.[2]

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations as modified below.[3]

Introduction

The hearing officer recommended overruling the Petitioner's challenges to the ballots of Wesley Biggs and Michael Flynn on the basis that they were not supervisors under the Act, sustaining the Petitioner's challenges to the ballots of Joseph McDonald and William Wiley on the basis that they were supervisors under the Act, and sustaining the Petitioner's challenge to the ballot of Scott Ellzey on the basis that his position was not intended by the parties to be part of the unit[4] and that he lacked a sufficient community of interest with the unit employees. The hearing officer also overruled the Petitioner's challenge to the ballot of Derrick Jordan, finding that, although Jordan occupied a position not specifically enumerated in the unit description, and for which there was no extrinsic evidence as to the parties' intent, Jordan shared a sufficient community of interest with unit employees to warrant his inclusion in the unit. For the reasons expressed below, we adopt the hearing officer's recommendation to overrule the challenge to Jordan's ballot, but we reverse the hearing officer's recommendations to overrule the challenges to the ballots of Biggs and Flynn, and to sustain the challenge to the ballots of McDonald, Wiley, and Ellzey.

I. WESLEY BIGGS

A. Facts

The hearing officer overruled the challenge to Wesley Biggs' ballot, finding that Biggs was not, as alleged by the Petitioner, a supervisor under the Act. For the following reasons, we reverse the hearing officer's finding.

Biggs was hired as a mechanic in June 2001. In November 2002, the Employer promoted Biggs to the position of lead/charge hand. In this position, Biggs both oversaw and worked with a crew of seven to eight employees. Biggs worked under the immediate supervision of crew supervisor Tim Sonnier. Each morning, before Sonnier's arrival, Biggs met with the crew employees to discuss the day's work schedule and to make sure that each employee knew what work needed to be done and who would do it. At the time of Biggs' promotion, Sonnier told employees "Wesley [Biggs] was getting promoted. You know what I'm saying? Whatever he tells you all, I'm backing him up all the way."

The record includes evidence of Biggs' authority to send employees home. Specifically, the credited testimony of employee Sam O'Cain establishes that, on one occasion, O'Cain "got smart" with Biggs verbally, and as a result Biggs sent O'Cain home. Biggs did not consult with anyone prior to sending O'Cain home. In addition, M. Todd Davidson, who was Biggs' predecessor in the lead/charge hand position, credibly testified that while he

[1] By order dated February 18, 2004, the Board adopted the Acting Regional Director's Report overruling Objections 1-7, and 9.

[2] The parties stipulated at the outset of the hearing that the ballot of Charles McGee should be counted and that the ballots of Terrence Summers and Albert Strickland should not be counted.

[3] In adopting the hearing officer's recommendation to overrule Employer's Objection 8 concerning alleged threats made by Union Organizer Samuel Ridgeway against Supervisor Scott Curtis, we note the absence of any evidence that the alleged objectionable conduct affected any of the voting employees. Further, we reject the Employer's contention that it was prejudiced by the hearing officer's refusal to allow the introduction of additional evidence of Ridgeway's allegedly objectionable conduct, as the proffered evidence does not establish that the conduct affected employees who were eligible to vote in the election.

We also adopt, for the reasons given in the Report, the hearing officer's recommendation to overrule the challenges to the ballots of Ryan Noel and Sam O'Cain. The Employer contends that the election should be set aside if we find that the ballots of O'Cain and Jordan should be counted, asserting that other similarly-situated employees (i.e., those whose precise job descriptions were not listed in the unit description) might have been eligible to vote but did not know that fact. The Employer cites no evidence or case law in support of its contention, and we find the contention to be without merit.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the challenges to the ballots of Alvin White, Christopher Snyder, Ronald Robbins, and Richard Ardilla, and to sustain the challenge to the ballot of Edward Rivers.

[4] The appropriate unit, as set forth in the stipulated election agreement is: "All crane operators, front end loader operators, forklift operators, mechanics and mechanics helpers, plant operators, plant maintenance workers, oilers, backhoe operators, and motor grader operators employed by the Employer at its Theodore, Alabama facility; excluding office clerical employees, professional employees, temporary employees, guards and supervisors as defined in the Act."

occupied that position prior to Biggs' promotion, Supervisor Sonnier told him that he (Davidson) had the authority to send an employee home.

The hearing officer found that Wesley Biggs exercised, at most, routine and sporadic supervisory authority, and thus was not a supervisor under Section 2(11) of the Act. We disagree with the hearing officer and reverse his recommendation to overrule the challenge to Biggs' ballot.

B. Analysis

The principal argument advanced by the Petitioner is that Biggs exercised supervisory authority when he sent O'Cain home for misconduct. Contrary to the hearing officer, we agree with the Petitioner that this incident demonstrates Biggs' supervisory status.

It is well settled that the authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. E.g., *Silver Metal Products*, 244 NLRB 25, 28 (1979) (authority to send employees home for "loafing" evinces supervisory status). The Board has recognized an exception to this rule where the authority to send home is limited to instances of egregious employee misconduct. That authority has not been found to require the exercise of independent judgment, and thus has not been typically considered to constitute statutory supervisory authority. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996).

Here, the record shows that Biggs' exercised supervisory authority in sending O'Cain home. The record shows that O'Cain did not engage in egregious misconduct. Rather, he got "smart" with Biggs and, offended by the comment, Biggs exercised his discretion to discipline O'Cain by sending him home. Biggs took this disciplinary action without consulting anyone. Clearly the exercise of discretion in effectuating this disciplinary action demonstrated the possession of supervisory authority.

In contending that Biggs' action does not demonstrate the exercise of supervisory authority, our dissenting colleague relies on *Asuza Ranch Market*, 321 NLRB 811 (1996), where the Board declined to find supervisory status with respect to an individual where the evidence indicated that the individual could grant employee requests to leave early and decide on his own whether to send an employee home for the day. That case is clearly distinguishable. The authority there existed for the few hours when the general manager was not present. Further, there was no showing that the individual's authority was ever exercised at all, much less exercised in connection with a disciplinary matter resulting in a loss of pay.

Further, Biggs' exercise of his discretion in sending O'Cain home was reflective of the authority expressly reposed in Biggs. As noted above, Supervisor Sonnier told Biggs' predecessor that he was authorized to send employees home, and also told employees—at the time of Biggs' promotion—that they are to do whatever Biggs tells them to do. These comments constitute corroborating evidence of Biggs' supervisory status, and contradict the hearing officer's characterization of Biggs' authority as being nothing more than routine and sporadic.[5]

Accordingly, we find that the record establishes Biggs' supervisory status, and we shall sustain the challenge to his ballot.

II. MICHAEL FLYNN

A. Facts

The hearing officer found that Michael Flynn was not a supervisor under the Act. For the following reasons, we disagree and reverse that finding.

At the time of the election, Flynn was a lead/charge hand in the Quad Rack area, under the supervision of Kenneth McDonald. McDonald described Flynn's duties as being "my eyes and my ears on the ground," and "to hand out instruction and to make things safe and productive." The record establishes that on one occasion,[6] Flynn intervened in a dispute between two employees involved in a heated argument. Flynn decided to send both employees home. Flynn made his decision to send the employees home without consulting anyone.

It is also uncontradicted that, on at least one occasion, Flynn granted time off to employee Bronski Ray after Ray requested it. As with the incident involving the arguing employees, Flynn acted without consulting anyone.[7]

The hearing officer recommended overruling the challenge to Flynn's ballot, finding that—as with Biggs—any authority Flynn exercised was routine and sporadic. We disagree.

B. Analysis

Contrary to the hearing officer, we find that the above evidence establishes that Flynn possessed statutory supervisory authority.

As noted above, supervisory authority is demonstrated by the exercise of discretion in sending employees home. *Silver Metal Products*, supra. Here, the record shows that, like Biggs, Flynn exercised supervisory authority in

[5] We thus find no merit to the dissent's contention that this corroborating evidence "sheds no light" on Biggs' supervisory authority.

[6] The record does not indicate precisely when this event occurred.

[7] Ray testified without contradiction that, on at least one occasion, Flynn granted Ray's request for time off without consulting anyone else.

this regard. Specifically, Flynn observed that two employees were arguing. As with the employee sent home by Biggs, these employees were not engaged in egregious misconduct. They were simply having an argument. Acting alone, Flynn exercised discretion and independent judgment in deciding to send the two employees home, and these employees suffered a loss of working time and pay as a result of this action.[8] Clearly, Flynn's decision in these circumstances constituted the exercise of supervisory authority.

Our dissenting colleague contends that this incident does not demonstrate Flynn's exercise of supervisory authority, because Supervisor Kenneth McDonald's testimony indicated that Flynn could discipline employees only with McDonald's express prior approval. We do not read McDonald's testimony so narrowly. McDonald testified that Flynn's duties entailed "independent thinking," that Flynn could take disciplinary action "on my authority," and the uncontradicted evidence established that Flynn did in fact send employees home for arguing without consulting McDonald. Further, Flynn's supervisory authority is corroborated by evidence that, on at least one occasion, Flynn granted an employee's request for time off. Indeed, the granting of time off is a well-established secondary indicia of supervisory status. E.g. *Property Markets Group*, 339 NLRB 199, 210 (2003). Here, Flynn granted the time off without consulting anyone.

In characterizing the above incidents as routine and sporadic, the hearing officer failed to adequately consider the significance of Flynn's actions in these incidents. Specifically, the hearing officer failed to consider the significance of Flynn's exercise of discretion. In view of this evidence, we find that the record amply demonstrates that Flynn possesses Section 2(11) authority. Accordingly, we shall reverse the hearing officer and sustain the challenge to Flynn's ballot.

III. JOSEPH MCDONALD

A. Facts

The hearing officer found that Joseph McDonald was a supervisor under the Act. We disagree, and for the following reasons overrule the challenge to the ballot.

At the time of the election, McDonald's title was "maintenance supervisor."[9] The record establishes that McDonald spent all of his time welding, as did the rest of the welding crew with whom he worked. Each morning, there was a meeting among maintenance department employees during which McDonald informed the three other employees what jobs they would perform that day. McDonald based these instructions on a list he was given by his supervisors, Tom Brown and Phil Hartley. McDonald did not prioritize these tasks. According to McDonald, he could give these instructions if Brown and Hartley were not available, but there is no evidence in the record that he actually did so.

McDonald testified that, after checking with Brown and Hartley, he could send an employee to another job in the plant. When doing so, McDonald might take into account each welder's particular abilities in determining who should do a particular job. However, McDonald testified that each welder was roughly the same in skill level.

According to one employee, McDonald once gave an employee permission to go home when the employee felt sick.

Based on this evidence, the hearing officer found that McDonald was a supervisor within the meaning of the Act because he exercised independent judgment in assigning employees and directing their work. For the following reasons, we reverse.[10]

B. Analysis

Contrary to the hearing officer, we find that McDonald did not use independent judgment in the assignment or direction of employees.[11] As set forth above, McDonald testified that he told employees what to do each morning, but that his instructions were based on a list compiled and prioritized by Hartley. Thus, his instructions were circumscribed and not indicative of independent judgment. *Dynamic Science, Inc.*, 334 NLRB 391 (2001)(finding no supervisory status for crew leader whose authority was "extremely limited and circumscribed by detailed orders and regulations issued by the Employer"). McDonald also admitted that prior to his promotion in May 2003 (after the election in April 2003), he had to check with Brown or Hartley before sending another employee to work on a different job. Moreover, McDonald also testified that the employees' skills were more or less equal. In these circumstances, the record

[8] Supervisor Kenneth McDonald testified that sending employees home early could be a form of discipline and would result in a loss of pay.

[9] Shortly after the election, McDonald received a raise and a promotion to "Lead Hand" in the "Maintenance-Coating Site." The Employer does not dispute that, after this promotion, McDonald became a supervisor within the meaning of the Act.

[10] Because we find that McDonald did not possess any primary indicia of supervisory status, we find it unnecessary to address the hearing officer's findings concerning whether he possessed any secondary indicia of supervisory status.

[11] In agreement with the hearing officer, we find there is insufficient evidence to establish that McDonald had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or adjust grievances, or to effectively recommend such action.

does not establish that McDonald's assignment of work involved the use of his discretion.

As to the incident of permitting an employee to go home when he felt sick, there is no evidence that McDonald exercised independent judgment in determining whether that employee should have been sent home. Thus, the record does not support the hearing officer's finding that McDonald was a supervisor, and we overrule the challenge to his ballot.

IV. WILLIAM WILEY

A. Facts

The hearing officer found that William Wiley was a supervisor under the Act. We disagree for the following reasons.

Wiley began work with the Employer in 2002 as an "Electrician-lead." During his job interview, Wiley was told by Supervisor Fabrice Storck that Wiley would eventually replace Storck as supervisor once construction of the Quad Rack area of the Employer's facility was completed. Storck, however, never left and continued as supervisor after the construction was completed.

In June 2002, Storck went on vacation and announced that Wiley would supervise employees in his absence. After returning from his vacation, and continuing through November 2002, Storck spent much of his time at a worksite about 6 miles away. During this period, Wiley spent about half of his time assigning jobs to a crew of five to seven employees and directing their work, sometimes inspecting it. Wiley also made up the work rotation schedule, although he testified that it was an easily predictable schedule. The other half of his time was spent performing the same electrician's work as the employees in the crew.

After November 2002, Supervisor Storck began spending more time at the facility, resulting in an apparent change in Wiley's status and duties. From this time on Storck assigned electricians to different tasks, regardless of whether Wiley wanted them to do a different job. Wiley was also told at this time that Storck, not Wiley, would be signing timecards. In light of these changes, Wiley became concerned about his status and met with Storck to discuss his concerns in January 2003. Storck told Wiley that he was a "supervisor in training," and that his official classification was being changed from "electrician" to "electrician/programmer." Following this meeting, Wiley's assignment of jobs to employees entailed telling them to do jobs Storck had identified, jobs that were ongoing projects (e.g., preventive maintenance), or jobs that other supervisors or operators had told him about.

The hearing officer found that "there is sufficient evidence to show that Wiley has engaged in the primary and secondary indicia of supervisory status," without further elaboration. We disagree and overrule the challenge to Wiley's ballot.[12]

B. Analysis

The record does not support a finding that Wiley was a statutory supervisor when the election was held in April 2003. [13] Assuming arguendo that Wiley had exercised independent judgment in assigning work and directing employees from June through November of 2002, the record indicates that he no longer did so after January 2003. After that time, Wiley's direction of employees consisted of making sure they performed the jobs that Storck told them to do, or jobs that were always going on, such as preventive maintenance. These types of assignments do not involve the use of discretion within the meaning of Section 2(11). See *Ferguson Electric Co.*, 335 NLRB 142, 146 (2001) (finding foremen who only follow direction from supervisors when assigning jobs are not using independent judgment under Section 2(11)).

Furthermore, there is no evidence that Wiley's preparation of the work schedule involved independent judgment. Wiley testified that he could "pretty much predict" what the schedule would be, and he "more or less formalized it on a calendar format." This type of scheduling, without more, fails to demonstrate that he used the necessary independent judgment to constitute the Section 2(11) assignment of employees. See *Bakersfield Californian*, 316 NLRB 1211, 1222 (1995) (scheduling, where work was regular, vacation requested in advance, conflicts resolved by seniority, and overtime routinely granted, did not involve independent judgment). For these reasons, we find that Wiley is not a supervisor within the meaning of the Act, and we overrule the challenge to his ballot.

V. SCOTT ELLZEY

A. Facts

The hearing officer found that Scott Ellzey lacked a community of interest with unit employees and recommended that the challenge to his ballot be sustained. We disagree and reverse the hearing officer's findings for the following reasons.

[12] Because we find that Wiley did not possess any primary indicia of supervisory status, we find it unnecessary to pass on the hearing officer's findings concerning Wiley's possession of secondary indicia.

[13] In agreement with the hearing officer, we find there is insufficient evidence that Wiley had the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or adjust grievances, or to effectively recommend such action.

At the time of the election, Ellzey was a lead hand in an area of the facility called the GSPU plant. From January 2003 onward, Ellzey spent half of his time performing quality control work, and the other half performing production work alongside stipulated unit employees. His supervisor in GSPU was Sandy Heineman, who also supervised the other GSPU employees. Each employee was qualified to do practically all the jobs in the GSPU plant, as was Ellzey. The lone exception to this is that, when the plant was in production, Ellzey performed quality control work, which the other employees did not do. However, when the plant was not in production, Ellzey performed the same tasks as the other employees. Ellzey primarily worked the day shift, as did all of the GSPU employees. The stipulated unit is silent as to the inclusion or exclusion of quality control employees.

The hearing officer recommended that the challenge to Ellzey's ballot be sustained, finding that neither the stipulation nor the record evidence evinced the parties' intent to include Ellzey's quality control position in the unit, and that Ellzey lacked a sufficient community of interest with the unit employees. We disagree.

B. Analysis

Contrary to the hearing officer, we overrule the challenge to Ellzey's ballot because we find that he is a dual-function employee who maintains a substantial interest in the wages, hours, and other working conditions of unit employees.

Ellzey clearly performs both production unit work and work related to quality control. Under well-established Board law, "[t]he test for determining whether a dual-function employee should be included in a unit is 'whether the employee [performs unit work] for sufficient periods of time to demonstrate that he . . . has a substantial interest in the unit's wages, hours, and conditions of employment." *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997) (citing *Berea Publishing Co.*, 140 NLRB 516, 518–519 (1963)).[14] The Board has no bright line rule as to the amount of time required to be spent performing unit work but rather makes this determination according to the facts of each case. *Martin Enterprises*, 325 NLRB 714, 715 (1998). The Board has found that dual-function employees have a substantial interest with unit employees even when they perform unit functions less than half the time. *Wilson Engraving Co.*, 252 NLRB 333, 334 (1980); see also *Avco Corp.*, 308 NLRB 1045 (1992).

In this case, Ellzey spends approximately half of his time performing unit functions. Ellzey testified that from January 2003 through the date of the election he worked in the GSPU plant of the Employer. While there, he spent half of his time performing production work. As such, he worked with unit employees in operating cranes, in driving a forklift, and in working with mechanics, operators, and oilers. All of these positions are unit jobs. Ellzey testified that when not in production, the plant employees all performed the same tasks and were more or less interchangeable; e.g., there were no set crane operators or forklift operators. From this evidence, it is clear that Ellzey has a substantial interest in the unit's wages, hours, and conditions of employment. Accordingly, we overrule the challenge to his ballot.[15]

DIRECTION

IT IS DIRECTED that the Regional Director for Region 15 shall, within 14 days of this Decision and Direction, open and count the ballots of Charles McGee, Ryan Noel, Sam O'Cain, Alvin White, Christopher Snyder, Ronald Robbins, Richard Ardilla, Derrick Jordan, Joseph McDonald, William Wiley, and Scott Ellzey. The Re-

[14] In analyzing Ellzey's eligibility, the hearing officer applied the standard set forth in *Caesars Tahoe*, 337 NLRB 1096 (2002), which concerned the resolution of challenged ballots in an election involving a stipulated unit. Under that test, the Board will resolve a challenge concerning a stipulated unit first on the express terms of the stipulation, second, if the terms are ambiguous, on extrinsic evidence of the parties' intent, and third, if the intent cannot be determined, on community-of-interest principles. Id. at 1097. Although, as explained above, we apply the standard articulated in *Air Liquide*, we would reach the same conclusion under the standard applied in *Caesars Tahoe*. First, the stipulated unit description does not mention quality control employees, and thus sheds no light on the parties' intent to include or exclude Ellzey's position. Second, as the hearing officer noted, neither party provided any extrinsic evidence revealing the parties' intent to include or exclude Ellzey's position. Third, we find that Ellzey shared a sufficient community of interest with unit employees. As such, his position consists of unit work half the time, shows substantial interchange with unit members, shares common supervision, and earns a comparable wage to unit members. See *Harold J. Becker Co.*, 343 NLRB No. 11, slip op. at fn. 4 (2004) (finding no conflict in that case between hearing officer's application of *Caesars Tahoe* and Board's use of *Air Liquide*).

[15] For similar reasons, we also adopt the hearing officer's recommendation to overrule the challenge to the ballot of Derrick Jordan. Jordan, who for the 6 months prior to the election worked 12-hour shifts, was clearly a dual-function employee with a substantial interest in the wages, hours, and other conditions of employment of the unit employees. Were we to apply the test from *Caesars Tahoe*, as the hearing officer did, we would reach the same conclusion. Jordan's position, like Ellzey, does not appear in the stipulated unit description and thus sheds no light on the parties' intent to include or exclude it from the unit. Also like Ellzey, the parties presented no extrinsic evidence concerning their intent to include or exclude him. Finally, as noted above, Jordan performed unit work as an operator alongside unit employees, under common supervision as unit employees. Thus, we find he shared a sufficient community of interest with the unit.

gional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The evidence here is insufficient to support the majority's finding that Biggs and Flynn are statutory supervisors based on their authority to discipline employees.[1]

With regard to Biggs, the majority's finding is based on a single incident in which he sent an employee home because the employee "got smart" with Biggs. Although Biggs apparently did not consult with anyone prior to sending the employee home, this by itself is insufficient to establish that Biggs utilized the independent judgment necessary to establish supervisory status. See, e.g., *Azusa Ranch Market*, 321 NLRB 811 (1996) (employee not found to be a supervisor despite his authority to "decide on his own" to send an employee home for the day). The majority also relies on the testimony of M. Todd Davidson, Biggs' predecessor, that Supervisor Tim Sonnier had told Davidson that he could send an employee home if the employee "got out of line." But Davidson's testimony does not establish that Sonnier ever made such a statement to Biggs.[2] Moreover, Davidson's testimony sheds no light on whether Biggs exercised discretion in sending the employee home. In the absence of specific evidence that Biggs exercised independent judgment in determining whether the employee should be sent home, there is no basis for concluding that Biggs acted with supervisory authority. See, e.g., *Washington Nursing Home*, 321 NLRB 366 (1996) (no supervisory status found where authority to send home employees who were impaired by substance abuse was circumscribed and did not involve the exercise of independent judgment).

Similarly, the majority's finding that Flynn exercised independent judgment in sending two employees home for fighting is not supported by the evidence. As with Biggs, the majority bases its finding on evidence that Flynn acted without consulting anyone else. However, there is no evidence to establish that Flynn acted with independent judgment. Indeed, testimony by Supervisor Kenneth McDonald indicates that Flynn could discipline employees only after McDonald had authorized Flynn to do so.

Only those individuals who possess "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees". *Azusa Ranch Market*, 321 NLRB at 812 (citation omitted). Wesley Biggs and Michael Flynn fall into the latter category.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[1] I join with the majority in adopting the hearing officer's report, as modified, with respect to all other issues presented here.

[2] Contrary to the majority, I attach little significance to Sonnier's vague directive to employees that they are to do "whatever" Biggs tells them.